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Supreme Court of the United States.

OCTOBER TERM, 1904

No. 283.

ECLIPSE BICYCLE COMPANY,

Appellant,

vs.

WILLARD M. FARROW.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

In July and December, 1896, Willard M. Farrow made applications for Letters Patent on certain automatic coaster brake devices for bicycles. On June 5th, 1897, he entered into a written contract with the Eclipse Bicycle Company whereby, upon certain terms therein specified, he assigned to said company his interest in both applications and in all future improvements thereon.

This action was brought by Farrow in the Supreme Court of the District of Columbia for royalties due under the contract on such Farrow coaster brakes as the Eclipse Bicycle Company had made and not accounted for, and also for royalties on coaster brakes of another style, called "Morrow Coaster Brakes," that have been made and sold by said company.

It is necessary to refer in some detail to the pleadings as well as to the contract, inasmuch as we shall contend in our argument, that the case was tried and an interlocutory decree rendered by the trial court on one theory as to the nature of the issue raised, and that said decree was sustained by the Court of Appeals, and subsequently expanded by another judge of the lower court, as an entirely different cause of action.

It is our contention that royalties on the said Morrow device are demanded in the bill of complaint on the theory that the Morrow device therein referred to is the *mechanical equivalent* of one of said Farrow devices, and that the case was tried and the interlocutory decree rendered by Mr. Justice Cole upon that understanding.

We further contend that on the appeal from the interlocutory decree the Court of Appeals for the District of Columbia sustained said interlocutory decree on a very different theory, namely, that *the terms of said contract imply* a covenant on the part of the Eclipse Bicycle Company (*in addition* to those therein set forth) to manufacture and sell *exclusively* the said Farrow coaster brakes; that, consequently, the sale of "Morrow coaster brakes" or, in fact, any other coaster brakes (no matter what their construction), by said company is a fraud on Farrow, for which said company is liable in damages; and that said company should be required to pay, as damages, royalties on the Morrow coaster brakes in the amount prescribed in said contract with reference to said Farrow coaster brakes. Judge Hagner, who heard exceptions to the auditor's report, adopted this theory, and accordingly expanded the interlocutory decree to cover another Morrow coaster brake besides the one specified in the bill of complaint, and the interlocutory decree.

In affirming the final decree the Court of Appeals again rested its decision upon this theory of the case.

The Contract.

The contract contains the following provisions:—

First. The Eclipse Company agrees to pay Farrow as advance royalties the sum of twenty-five hundred dollars ($2,500) in installments, and also a stipulated royalty "on all

the devices made and sold, *embodying* the *inventions* above referred to" (those of his said applications for Letters Patent);

Second. The royalty is to be increased in case less than a certain number of the devices shall be sold annually;

Third. The Eclipse Bicycle Company agrees to make returns periodically as to the number of the devices made and sold by said company, or by others, to pay the royalties due, and *in case of default, the said inventions are to revert to Farrow;*

Fourth. Provision is made for taking out foreign patents on said devices, at the election of said company, and at its expense;

Fifth. The Eclipse Bicycle Company agrees to defend said invention against infringement, and "*to use due business diligence in the manufacture and sale of the devices embodied in said letters patent, and push the sale by all proper and legitimate enterprise, otherwise the title in the invention reverts back to the said Willard M. Farrow;*"

Sixth Provision is made for the sale of foreign patents on these devices, and the division of the proceeds; and,

Seventh. It is provided that the Eclipse Bicycle Company shall be relieved from payment of royalty if Farrow's said application for Letters Patent shall be finally rejected by the Patent Office.

This contract is found in the Record at pages 4-6. The italics are ours.

The suit at bar was begun in the Supreme Court of the District of Columbia in February, 1898.

The Original Bill of Complaint.

The original bill of complaint recites the negotiation and execution of the said contract between Farrow and the Eclipse Bicycle Company, and then alleges in substance as follows, viz:

(a) That Farrow received from the Eclipse Bicycle Company $2,500 on account of royalties; (b) that said defendant company began to manufacture and sell a large number of said coaster brake devices, and to advertise them, designating

them "Farrow Automatic brake and coaster;" (c) that one Morrow, the superintendent of said company, "conniving and designing to defeat the interest of your complainant as set forth in said agreement, and on or about the 15th day of July, 1897, filed an application in the United States Patent Office for letters patent on a device in effect the same as that purchased by the defendant from your complainant, accomplishing the same result, and *being a mere mechanical equivalent therefor;*" (d) that Morrow assigned a half interest in his said invention to one Fulton, then the president of said company; (e) that a large number of Morrow's said devices have been manufactured and sold by said company under the name, "Morrow brake and coaster;" (f) that said defendant company has sought to evade said contract by taking up the manufacture of said Morrow coaster brake in place of Farrow's, and by improperly prosecuting Farrow's said applications; (g) that said company has failed to furnish the statements called for by said contract as to the number of coaster brakes made and sold by it; (h) that a large number of the said Farrow Automatic coaster brake devices, and also a large number "of similar devices substituted therefor" have been made and sold by said company, and that a disclosure is necessary; (i) that under the terms of said contract said defendant became Farrow's agent for prosecuting his said applications for Letters Patent, and for manufacturing and selling the said devices; that said defendant has sought "to suppress the use of (Farrow's) device, and has allowed his patents to become involved," but that "any improvements that have been made on Farrow's said device inure to the benefit of both Farrow and the defendant according to the terms of said agreement."

The relief prayed for in this original bill is: (a) that the Eclipse Bicycle Company be made to account for the "Farrow brakes" made and sold by it, and for "the devices substituted by the defendant for the same;" and (b) that any improvements in the device that was the subject of said contract, be declared by the court "to have been made by the defendant as the agent and partner of your complainant for the benefit of the partnership under the said agreement."

The said original bill of complaint is found in the Record at pages 1–4. The underscoring is ours.

A demurrer was filed on the ground that the bill did not state facts entitling complainant to the relief prayed, also on the ground that the bill was multifarious, and also on the ground that complainant had a full and adequate remedy at law. The demurrer was withdrawn, without prejudice, on stipulation that said objections might be urged with the same effect at the hearing (Rec. pages 8–9).

The Original Answer.

An answer was substituted for the demurrer, in which the following defenses were raised, viz: (a) lack of novelty in the devices on which Farrow applies for Letters Patent, the rejection of Farrow's said applications by the Patent Office, and a consequent failure of the consideration for said contract; (b) that while said company is making the "Morrow brake" referred to in said bill, said device is not the mechanical equivalent of Farrow's device, and was not designed for the purpose of defeating Farrow's interests; and (c) denials of the material allegations of the bill. (See pages 8–10).

Supplemental Bill of Complaint.

After issue was joined by the replication, a supplemental bill of complaint was filed, by leave of court, which makes the following allegations, viz: (a) that the Patent Office refused to disclose to Farrow the status of his said applications; (b) that Farrow gave the attorney of the Eclipse Bicycle Company an exclusive power of attorney to prosecute his said applications; (c) and that said company is about to sacrifice said applications by neglecting to properly prosecute them, in furtherance of a scheme on the part of the defendant to evade its obligations to him on the contract, "and to substitute for his invention the one now being exploited by the said defendant company, the same being substantially a mere reproduction in a somewhat altered form of the complainant's said invention and accomplishing the same purpose."

Answer to Supplemental Bill.

The answer to the supplemental bill denies that Farrow's applications have been improperly prosecuted, and alleges that

Farrow has at all times been informed as to their status. This answer further denies the material averments of the supplemental bill, and sets forth the fact that a patent has issued to Morrow on his said device. (Rec., pages 13–14).

Trial and Interlocutory Decree.

The defendant took no testimony. The case was heard before Mr. Justice Cole, who, on June 3, 1899, made an interlocutory decree and referred the case to the auditor (Rec., page 119). Afterwards the case was re-argued before the same judge, and on Feb. 1, 1900, a second interlocutory decree was entered in the same terms as the decree of June 3, 1899 (Rec., page 120). Mr. Justice Cole did not write an opinion on either occasion.

The interlocutory decree awarded Farrow royalties under said contract on devices made by the Eclipse Bicycle Company, "*embodying the inventions mentioned*" *in Farrow's said applications for Letters Patent* (which were numbered respectively, 600,359 and 614,140); and also specifically upon that particular Morrow coaster brake that is averred in paragraph 6 of the bill of complaint to be the mechanical equivalent of the devices described in Farrow's said applications (Rec., page 120). Said Morrow coaster brake is that described in Letters Patent granted to Alexander P. Morrow, dated the 20th day of September, 1899, and numbered 611,073 (Rec., pages 115–120), for which application for these Letters Patent was filed by Morrow on July 15, 1897, as set forth in paragraph 6 of the bill of complaint.

First Appeal.

A special appeal to the Court of Appeals of the District of Columbia having been allowed, said court affirmed the decree and remanded the case to the court below for the further proceedings therein directed (Rec., pages 121–123).

The opinion of said Court of Appeals was delivered by Mr. Justice Morrow, and is found in 16 App. D. C. 468.

Defendant's Motion to Amend and Re-Open, Order and Second Appeal.

After the case had been remanded to the Supreme Court of the District, the Eclipse Bicycle Company filed a motion for

leave to amend its answer and re-open the evidence (Rec., page 123). This motion was granted by Mr. Justice Cole (Rec., page 216), and an amended answer was filed (Rec., page 217), but a special appeal having been allowed by the Court of Appeals, the order of the lower court was reversed, and the case again remanded with directions to proceed with the accounting (Rec., pages 229–230). The opinion of the Court of Appeals on this second appeal was also written by Mr. Justice Morrow and is found in 18 Appeals D. C. 101.

PROCEEDINGS ON ACCOUNTING.

The report of the auditor was filed June 2, 1902 (Rec., pages 231–235). He found that there was due from the Eclipse Bicycle Company to Farrow $4,808. He allowed no interest, because complainant's counsel waived interest (Rec., page 235). Exceptions to this report were filed by both parties.

Farrow excepted because the auditor had refused to require the defendant to account for coaster brakes of another type represented by a certain Exhibit E 10, which is also a Morrow coaster brake (Rec., page 373). The auditor reported that he found such differences between the inventions mentioned in Farrow's said applications and said Exhibit E 10, both in construction and mode of operation, that defendant was not required by the interlocutory decree to account for devices like Exhibit E 10, that it had manufactured and sold (Rec., pages 231–234).

Mr. Justice Hagner heard the argument on Farrow's exception to the auditor's report, and filed a written opinion which is found in the Record at pages 374–380. He sustained Farrow's said exception and remanded the case to the auditor with directions to re-state the account and to include it in an allowance for royalties on devices like Exhibit E 10 (Rec., page 380.) The auditor thereupon filed a second report, in which he awarded $12,297.20 as royalties on devices like Exhibit E 10 (Rec., pages 381–382). He also allowed interest on the various sums that went to make up said sum (Rec., page 383).

The defendant excepted to this allowance of interest, contending that complainant's previous waiver of interest estopped him from claiming it now (Rec., page 413).

The court once more remanded the case to the auditor, instructing him to embrace in a single schedule all the allowances in favor of the complainant (Rec., page 414). On this re-reference the auditor refused to allow counsel for defendant to be heard (Rec., page 414). In accordance with the last order of reference the auditor filed a schedule combining the allowance of $4,808 and the allowance of $12,297.20, making an aggregate allowance of $17,105.20, with interest from various dates on those various sums that aggregate $12,297.12 (Rec., page 415).

The decree confirming this last schedule was made April 20, 1903, the presiding justice holding that the defendant had no right to file exceptions to it.

Third Appeal.

From this decree of April 20, 1903, the Eclipse Bicycle Company appealed to the Court of Appeals, and said court affirmed said decree, after modifying it in form so as to decree that the complainant recover from the defendant the sum of $17,105.20 with interest on various parts of said sum from various dates Rec., pages 431–435). The decree was modified in this respect at the instance of the Court of Appeals, because it had been suggested by counsel that the decree on appeal before the Court was not final, since it failed to adjudge that the complainant should recover from the defendant the amount found due by the auditor (Rec., page 432).

Appeal to This Court.

On April 13th, 1904, an appeal to this court was allowed (Rec., page 435), and said appeal has been duly perfected.

ASSIGNMENT OF ERROR.

The decree is erroneous.

1. In not dismissing the bill of complaint on the grounds assigned in the said demurrer.

2. In that it awarded complainant royalties on coaster brakes like those described in Farrow's said applications Nos. 600,359 and 614,140.

3. In that it awarded complainant royalties on coaster brakes like that described in Letters Patent to Morrow, dated September 20, 1899, and numbered 611,073, the same being the "Morrow coaster brake" referred to in paragraph 6 of the bill of complaint.

4. In sustaining the exceptions (Rec., page 373) to the auditor's report (Rec., page 231), and referring the case back to the auditor to re-state the account so as to include an allowance for royalties on Morrow coaster brakes of that other description represented by complainant's Exhibit E 10 (Rec., pages 380–381).

5. In overruling the exceptions (Rec., page 413) filed on behalf of defendant to the second report (Rec., pages 381–382), relating to the allowance of interest.

6. In overruling the exceptions filed by the defendant to the auditor's report which relate to the exclusion by the auditor of evidence showing the state of the art to which Farrow's said applications belong, at the times when those applications were filed, respectively (Rec., pages 425, 426, exceptions 7–10 inclusive, and 15).

I.

ARGUMENT.

The original and supplemental bills of complaint state an action for accounting under the contract, and royalties were awarded by the trial court on the earlier Morrow coaster brake (that of Morrow's patent No. 611,073), on the theory that said device embodies the inventions set forth in one of Farrow's said applications for Letters Patent on which defendant company has covenanted in the contract to pay royalties.

The bill of complaint alleges in paragraph 6 that the "Morrow Coaster Brake" (that of Morrow patent 611,073) is "a device in effect the same as that purchased by the defend-

ant from the complainant, accomplishing the same result, and being a mere mechanical equivalent therefor," and that the Eclipse Bicycle Company has manufactured and sold a large number of said devices. In paragraph 7 defendant is charged with substituting for the Farrow devices "another, the 'Morrow brake,' being as aforesaid a mere mechanical equivalent." In paragraphs 8 and 9 complainant alleges that a large number of Farrow devices have been manufactured and sold, for which said company has not accounted, and that "a large number of similar devices substituted therefor," have been manufactured and sold. In the prayer for relief the defendant is required to account for the Farrow devices manufactured and sold by it, and for "the devices substituted by the defendant for the same" (Rec., pages 1–4).

In paragraphs 7 and 10 of the original bill, and in the supplemental bill the complainant charges the defendant with (a) attempting to evade, or free itself from, the obligations of said contract by improperly prosecuting the Farrow applications, and so causing them to be rejected by the Patent Office, and with (b) taking up in the place of Farrow coaster brake, the manufacture of the Morrow coaster brake (Rec., pages 2–3, 11–12). It will be remembered that the contract provides that the company shall be relieved from the payment of royalty if Farrow's said applications are rejected by the Patent Office.

The theory of the case presented by the original and supplemental bill clearly is then, we submit, that the defendant company has prosecuted Farrow's said applications fraudulently in the Patent Office, thereby causing them to be rejected, and has taken up, in place of Farrow's coaster brakes, the manufacture of another coaster brake that is its mechanical equivalent, but that the court will not suffer the defendant company thus to evade its obligations under said contract because under these circumstances (1) the court will make said defendant company account for the Farrow *inventions* it has made and sold (whatever such inventions prove to have been), just as if the applications had been properly prosecuted and Letters Patent had issued on them, and (2) the said Morrow device is the mechanical equivalent of Farrow's, and therefore embodies his inventions.

Obviously the only covenant of the contract relied upon *in the bill of complaint* to sustain the suit is defendant's covenant to pay royalties on devices embodying Farrow's inventions.

The suit was also tried on this theory, and the defendant company was decreed to account to complainant for Morrow coaster brakes, on the ground that Morrow's said coaster brake is the mechanical equivalent of Farrow's device.

The Morrow coaster brake mentioned in the pleadings (that of Morrow's patent 611,073) is claimed to be the mechanical equivalent of that one of Farrow's applications that was filed December 1st, 1896, and numbered 614,140.

Both Farrow himself and his expert witness Doolittle analyzed and compared, one with the other, these said Morrow and said Farrow coaster brakes. (See Rec., pages 34, 48–49), and particularly 52–53, where is found Doolittle's testimony in reply to the request of complainant's attorney "to describe briefly the difference between the Morrow and Farrow forms of brake." Defendant took no testimony.

Mr. Justice Cole, who heard the case, did not write an opinion, as we have said, but the interlocutory decree that he signed shows on its face that royalties were awarded on the said Morrow coaster brake named in the bill of complaint (that of Morrow patent 611,073) on the ground that said coaster brake embodies the Farrow inventions, that is to say, is the mechanical equivalent of one of Farrow's devices. In its first paragraph said interlocutory decree awards royalties under the terms of the contract "upon all the devices manufactured by said defendant company *embodying the inventions* mentioned in" Farrow's said applications, and in the next paragraph it awards royalties "on the same terms and in the same manner expressed in the aforesaid contract" on said coaster brake of Morrow's patent 611,073 (Rec., pages 119–120).

II.

On the first appeal, namely, that from the interlocutory decree, the Court of Appeals sustained said decree on an entirely different theory of the case, namely, that the terms

of the contract imply a further covenant on the part of the Eclipse Bicycle Company that it will manufacture and sell no coaster brakes but those of Farrow's said applications.

That this was the theory on which the case was first determined by the Court of Appeals on this *first* appeal is distinctly stated in the opinion written by Mr. Justice Morris. The case is reported in 16 D. C. App. 468.

The Court of Appeals held on this first appeal that having covenanted to manufacture and sell Farrow devices "with due diligence," and "by all proper and legitimate enterprise," said defendant company cannot discard the Farrow devices and substitute therefor the invention of another person; that defendant's liability to Farrow for royalties on said Morrow coaster brakes does not depend upon the defendant's said covenant to pay royalties on devices embodying said Farrow's inventions, or upon whether as a matter of fact said Morrow coaster brakes do embody such inventions, but that on the contrary such liability depends upon said company's said covenants to sell the Farrow devices with diligence and enterprise. The Court of Appeals says that "the company and not Farrow took the risk of new inventions that might be superior to that of the contract." Because said company agreed "*to use due business diligence in the manufacture and sale*" of the Farrow devices, and to "*push the sale by all proper and legitimate enterprise*," the Court of Appeals refuses to permit it to make and sell any other coaster brakes, no matter what their construction may be, without paying to Farrow the royalty prescribed in the contract.

All doubt as to the theory on which the case was decided by the Court of Appeals is removed by the following explicit statement found in the opinion written by Mr. Justice Morris on the third appeal—that from the final decree:

> "The case has been argued before us on behalf of the defendant, mainly upon the theory that this is like a case of infringement of patent, or a case of patentable novelty wherein it is sought to be shown that some apparently new thing is patentably different from some old device. This is a wholly erroneous theory of the case. We believe that it was admitted that the device

of the Morrow patent, No. 611,073, was patentably different from the devices of the Farrow applications; and yet it was held that, in view of the contract between the parties by which the defendant company had effectively tied the hands of Farrow, its manufacture of the Morrow device of the patent No. 611,073 was virtually a fraud upon him. The ground of accountability under the contract is not that the Farrow and the Morrow devices are patentably identical, for they are not, but that the *manufacture of any other devices by* the defendant company, in evasion of its contract with Farrow, is a fraud upon the latter for which the company should account. If the contract had been in express terms that, in consideration of the assignment of his inventions by Farrow to the company, the latter would manufacture his devices exclusively, and no other, and should pay royalties to him therefor; and if thereafter, finding something that suited them better at less price, the company should disregard the agreement, discard the Farrow devices, and manufacture only the new device that had been found, can it be supposed for a moment that the company would thereby escape liability under the contract? But this is substantially the case under consideration. It is a case where equity will pursue a fraud whatever guise it takes" (Rec., pages 431, 433).

III.

On the third appeal, namely, that from the final decree, the Court of Appeals expanded the interlocutory decree on this erroneous theory of the case, so as to include Morrow coaster brakes like Exhibit E 10.

Exhibit E 10 is a sample of Morrow coaster brakes that defendant has made and sold. It is a later and a different style of brake from the Morrow brake specifically mentioned in the bill of complaint and interlocutory decree.

Exhibit E 10 was first introduced into the case on the accounting before the auditor when he was asked to award royalties on that type of brake, by virtue of the interlocutory decree.

On the accounting under the interlocutory decree the auditor held that before he could require defendant company to account for the sale of coaster brake like Exhibit E 10, he

> "must find that in construction and operation Exhibit E 10 in its various parts and combinations, is at least the mechanical equivalent of the claims set forth in said application (Farrow's first application 600,359), that is, the parts and combinations of Exhibit E 10 must produce the same effect by substantially the same mode of operation."

The auditor found that Exhibit E 10 was not the mechanical equivalent of the device of Farrow's application 600,359, and accordingly refused to award royalties thereon (Rec., pages 231–234).

Mr. Justice Hagner overruled the auditor and remanded the case to him with instructions to include in his report royalties on Exhibit E 10.

Mr. Justice Hagner stated that in overruling the auditor he adopted the theory of the case announced by the Court of Appeals on the appeal to that court from the interlocutory decree (the first appeal), but the learned Justice's explanation of the theory is difficult to follow (Rec., pages 374–381).

When the case came before the Court of Appeals on appeal from the final decree, defendant urged upon said court the impropriety of awarding royalties on coaster brakes like Exhibit E 10, since they did not embody the Farrow inventions. To this the Court of Appeals replied that in the view that the court took of the case it made no difference whether Exhibit E 10 did, or did not, embody the inventions of the Farrow applications, and accordingly it sustained Mr. Justice Hagner in awarging royalties on devices like Exhibit E 10 (Rec., pages 431, 433–434).

Complainant also urged upon the Court of Appeals that even if it should adhere to that theory of the case, still royalties should not have been awarded on devices like Exhibit E 10, inasmuch as the interlocutory decree is specific, and merely directs the auditor to take an accounting as to the devices of the two Farrow applications and as to Morrow's said earlier device (that of his patent 611,073). But the Court of Appeals brush aside this objection (Rec., page 434).

In the pages following we shall show that a cause of action has not been made out (1) either under the theory advanced by the Court of Appeals or (2) of that of the pleadings and interlocutory decree.

IV.

An action cannot be maintained upon the said theory advanced by the Court of Appeals, since the contract on which the suit is based contains no covenant, express or implied, to the effect that the Eclipse Bicycle Company will not make and sell no coaster brake but those of Farrow's applications, and no such agreement can be implied from the surrounding facts and circumstances.

If the defendant company can be held to the exclusive manufacture and sale of Farrow coaster brakes, it must be either because (a) the said contract contains an *express* covenant to that effect, or (b) terms from which such a covenant will be *implied*, or (c) because *facts* and *circumstances* are *pleaded* and *proven* from which the Court will *imply* such an agreement, or *estop* said defendant company from denying it. No one of these three causes of action has been pleaded, but we contend that no such action could be maintained under the facts and circumstances of this case, even if such an issue had been raised.

(*a*) *There is no such* express *covenant in the contract.*

There is no *express* covenant in the contract that said defendant company will continue to manufacture said Farrow devices, nor is there an *express* covenant that said company will manufacture no coaster brakes but the Farrow devices. The Court of Appeals concedes this in so many words in its last opinion (Rec., page 433).

(*b*) *There are no provisions in said contract from which such covenants can be fairly* implied.

The Court of Appeals implies such covenants from those quoted by it in the opinion rendered on the first appeal (16 D. C. 468), viz: that said defendant company "agrees to use due

business diligence in the manufacture and sale of the devices *embodied*" in said Letters Patent (those that should be granted on Farrow's said applications), and to push the sale by all proper and legitimate enterprise, "*otherwise the title in the said inventions reverts back to the said Willard M. Farrow*" (Rec., page 6). It is such a long stretch from these covenants to a covenant to manufacture and sell Farrow coaster brakes exclusively.

There are no *recitals* in the *preamble* to the contract from which any such understanding can be gathered. The preamble merely states concisely that Farrow has made certain inventions for which he has made application for Letters Patent, and that said defendant company "is desirous of acquiring the entire right, title and interest in and to said inventions as described in the above identified applications, and in any Letters Patent that may be issued thereon, and in and to all improvements that may hereafter be made by the said Willard M. Farrow on said inventions" (Rec., page 4).

The contract as a whole discloses that the parties had no thought or intention of tying up the defendant company so that it could not if it chose abandon the sale of the Farrow devices, and take up something different. On the contrary provision is made for that very contingency, for it expressly provides in the 5th paragraph, as we have seen, that if said defendant company fails "to push the sale" of the Farrow devices, or "to use due business diligence" in their manufacture, the title to said inventions shall revert to Farrow (Rec., page 6), and, in paragraph 3, that if said defendant company fails to pay royalties when due, said inventions shall revert to Farrow (Rec., page 5). These provisions are for Farrow's protection. On the other hand the company is guarded by the provision in the 7th paragraph to the effect that it shall be relieved from the payment of royalties if "Farrow, for any reason, fails to procure Letters Patent" (Rec., page 6).

But this identical question has been decided by this Court in *Thorn Wire Hedge Co. v. Washburn & Moen Manufacturing Co.* (159 U. S. 423). It appears that the Washburn & Moen Manufacturing Company in that case had purchased of the Thorn Wire Hedge Company certain patents on barbed wire fence, known as the Kelly patents, agreeing to pay for them,

as appeared by a written contract, by a royalty on all barbed fence wire which said Washburn & Moen Manufacturing Company, and its licensees, should make and sell under said Kelly patents. It was further agreed by said written contract that the Washburn & Moen Manufacturing Company should enter upon the manufacture of barbed fence wire under the Kelly patents, and *should use reasonable and diligent efforts "to supply the demand for this article"* throughout the country, and should also use proper and reasonable diligence in prosecuting infringers of the said Letters Patent, to the end that said patents might be fully enforced and sustained,

The Washburn & Moen Manufacturing Company subsequently began to sell another barbed wire fence, known as the "Brinkerhoff patent," which differed somewhat in form and construction from that of the Kelly patents.

Here, then is a case in which the facts are on all fours with those of the case at bar.

In this other case it was also contended that the defendant was liable for royalties, not because the Brinkerhoff fence infringed the Kelly patents—that is to say, embodied the inventions of the Kelly patents—but on the ground that the said covenant to use reasonable diligence to supply the demand with the Kelly fence, imported a covenant on the part of the Washburn & Moen Manufacturing Company not to make and sell barbed wire fence under any other Letters Patent than the Kelly patents, and not to make under patents in competition with them. The provisions of the contract between the Thorn Wire Hedge Co. and Washburn & Moen Mfg. Co., on which this contention is based are the same in substance, and nearly identical in language, with the words of the contract in suit upon which the Court of Appeals awards the decree.

This Court held in *Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co*, that the contract between the parties named failed to reveal any *express* covenant to the effect claimed, and that such a covenant could not be fairly *implied* from the language used.

It is clear from the decision rendered by this Court in said case of *Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co.*,

that the cause of action defined by the Court of Appeals on the appeal of the case at bar cannot be sustained upon any of the express covenants of the said contract, and that no covenant in support of such an action can be implied from the language of said contract, even had such a cause of action been alleged.

(*c*) *Finally, we point out that there are no facts or circumstances in connection with the dealings of the parties which imply an agreement to manufacture and sell Farrow coaster brakes exclusively, or which estop defendant from denying such an agreement.*

In his pleadings complainant stands fairly and squarely upon the contract and avers nothing else. It is true that in the supplemental bill complainant does aver that his applications were in jeopardy because they were not being properly prosecuted by the solicitor who had them in charge, and that said solicitor is in defendant pay, but that was intended to forestall the defense that defendant company is excused by the provision of the *seventh* paragraph of said contract from paying royalties on the Farrow devices, and their mechanical equivalents. because Farrow's applications had been finally rejected.

In its first opinion (16 D. C. App. 468) the Court of Appeals adverts to this charge that Mr. Skidmore, the solicitor in question, unnecessarily sacrificed certain claims of Farrow's said applications. Mr. Skidmore has protested his good faith in handling Farrow's applications, and the history of the cases disclosed by the file wrappers in evidence (Rec., pages 60–108) shows that he did vigorously and intelligently prosecute them. Briefly the history of the application is this:

Farrow's first application (No. 600,359) was allowed January 7, 1898 (Rec., page 80) with the four claims that are set forth on pages 76 and 77 of the Record as Nos. 1, 2, 3 and 4. It stood in that condition when this suit was instituted (Feb. 1898). Mr. Skidmore testified (as complainant's witness) that the allowed claims were of no value, and that they were not even worth the outlay of the final fee of $20.00. The application stood in allowable condition at the date when Mr. Skidmore testified (Rec., page 41). Up to that time, therefore, Farrow had suffered no injury. He then at least had full

information as to the condition of the application, and it lay in his power to have the patent issued.

The other Farrow application (No. 614,140), was put into several interferences. Mr. Skidmore, who was prosecuting this application also testified (and as complainant's witness) that after the interferences were declared, and after he had examined the preliminary statements filed by the other parties thereto, he consulted with Farrow, and finding that he could not prove reduction to practice at a date early enough to succeed in the interference proceedings, advised defendant company that, in his opinion, they had not the slightest chance of winning. The defendant company accordingly took no testimony in these cases (Rec., pages 38, 41), and all but claim 5 were rejected (Rec., page 51). The one claim that was not rejected by reason of the interferences stood allowed when Mr. Skidmore testified (Rec., pages 41, 51), and complainant then had full information regarding the application.

Not a particle of evidence has been introduced into the case to show that Mr. Skidmore did not prosecute the Farrow applications honestly, and with diligence and skill. Moreover, Mr. Skidmore testifies positively that he consulted with Farrow "many times on all material and important points" and that Farrow approved his conduct of the applications (Rec., page 58), and Farrow himself says, "I did all that Mr. Skidmore asked me to do and visited his office and had interviews with him and went to foreign places to sign papers—made two or three trips of that character" (Rec., page 34).

The only attempt that has been made to draw this into question is the testimony of Mr. Doolittle, complainant's expert, who seems to imply in his explanation of the scope and significance of the claims that were allowed in those applications that he could have done better if he had been in Mr. Skidmore's place (Rec., pages 45–47). The patents of the prior art in evidence, and which we shall presently refer to, show that Mr. Skidmore's judgment was sound.

The Court of Appeals does not say that Mr. Skidmore prosecuted the Farrow applications negligently or improperly, or that the manner in which they were prosecuted constituted a fraud upon Farrow; but in its first opinion refers to the fact

that certain claims of the Farrow application were allowed by the Patent Office on which patents might have issued, in order to show that there was not a total failure of consideration, as alleged in the answer (16 D. C., 468). It was the adoption of the Morrow coaster brake by the defendant company in place of the Farrow coaster brake that the Court of Appeals held to constitute the fraud.

But even if complainant had proved that the officers of the solicitor of the defendant company have, by fraud or negligence in the prosecution of Farrow's applications, lost claims that had been allowed by the Patent Office, or claims that might have been obtained, such fact would not avail him in this suit unless he could also show that the claim so lost cover the structures of those Morrow coaster brakes in controversy.

We shall show under subsequent headings that neither of the Morrow coaster brakes do embody the Farrow inventions.

We also fail to see what possible bearing upon this case it can have whether or not the defendant company has purchased the Stover and Hance patent which dominates certain of the Farrow inventions, and certain of the Morrow inventions. If the defendant company should seek to use said Stover and Hance patent to prevent Farrow, or those interested under him, from using his devices, there might be cause of complaint, but that has never been so much as suggested.

Inasmuch, therefore, as the contract in suit contains no express covenant that the defendant company will manufacture Farrow coaster brakes to the exclusion of all others, and no provisions from which such a covenant can be fairly implied, and since there are no circumstances in the case from which the court can imply such an agreement, it follows that this suit can only be sustained by showing that the Morrow coaster brakes in suit embody the inventions of the Farrow applications.

The Farrow application first filed, No. 600,359, is for a back pedaling coaster brake in which a brake band is contracted around an extension of the hub of the rear, or driving wheel of a bicycle, while the second application that he filed, No. 614,140, discloses a spoon brake that is pivoted to the bicycle

frame and made to engage the tire of the driving wheel on back pedaling.

The Morrow coaster brake specifically mentioned in the interlocutory decree (that of Morrow's patent 611,073) is a tire brake, and was compared by complainant's expert with the inventions of Farrow's said application No. 614,140 (Rec., pages 52–53). It bears no resemblance either in construction or operation to the other Farrow application, and has not been mentioned in that connection by counsel, experts, auditor, or courts.

The Morrow coaster brake Exhibit E 10 is a rear hub brake and was compared by complainant's expert with Farrow's said application No. 600,359 (Rec., page 248). Exhibit E 10 bears no resemblance either in construction or operation to Farrow's tire brake application, and has not been mentioned in that connection by counsel, experts, or courts.

We shall take up the comparisons in the order last mentioned, but it may simplify matters if before doing so we call attention to certain patents of the prior art that limit the scope of the inventions set forth in both Farrow applications to the specific means therein described.

V.

The inventions of both of Farrow's said applications are limited to the specific devices described in them, respectively.

Complainant's expert Mr. Doolittle, makes the following statement in his direct examination:

> "It was impossible for either Farrow or Morrow to obtain broad claims on the combined coasting and braking device operated by the pedals. This idea was old, as shown in the Stover and Hance patents, No. 418,142, of December 24, 1889, and British patent to Juhel, No. 8833 of 1895. The clutch used by Farrow and Morrow for coasting and by Morrow for applying the brake was old, as shown by the Stover and Hance patent, the Juhel patent, the British patent to Hartley, No. 19608 of 1890; the United States patent to Moise, No. 533,912, and the German patent, 91559" (Rec. page 53).

Again on cross-examination Mr. Doolittle says:

> "As far as the broad idea of a combined braking and coasting device or the broad idea of a back pedaling brake are concerned, neither Farrow nor Morrow could obtain a claim on such constructions, as those ideas were old, as shown in the Stover and Hance and other patents" (Rec., page 56).

On the hearing before the auditor Mr. Brown, one of defendant's experts, testified without objection on the part of the complainant, that prior to the dates of Farrow's applications (which upon the records are the dates of his conceptions of the devices, respectively), bicycles were in use that were provided with devices that would enable the bicycles to coast when the rider kept his feet on the pedals, and to apply the brake by back pedaling (Rec., page 264).

The patents of the prior art that were offered in evidence and marked and filed in the case, although excluded by the auditor from his consideration, are all back pedaling coaster brakes of this general description, and, besides, show devices that resemble in some respects those employed by Farrow to accomplish the same results. It can only be determined whether Farrow did, in fact, invent anything, and if so, what it is that he invented, by investigating the state of the art at the time his said applications were filed.

> *Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co.* (159 U. S., 423).

When the prior patents are taken into consideration, it becomes obvious that if there is any patentable novelty whatever in Farrow's said applications Nos. 600,359 and 614,140, the inventions reside in the merest details of construction, which are not found in the Morrow coaster brakes.

The Prior Art.

In *patent to Hiller*, No. 422,781 (Rec., pages 320, 321), there is described a clutch device exactly like that in Figs. 3 and 4 of Farrow's application 600,359 (Rec., page ——), which permits the bicycle to be driven forward and to coast.

In *patent to Cortland*, 520,728 (Rec., pages 325–332), there is a brake band 24 that lies in a recess in the clutch disc 6

(attached to the hub), so that when the operating discs 18 and 8 are moved relatively, the clutch band is contracted around the surface 26 of the clutch ring 6, which is attached to the hub, and will brake the hub. When the brake is placed in an intermediate position by the feet upon the pedals, and the feet are kept upon the pedals, the wheel is free to coast.

In *British patent to Edge* (Rec., pages 333-342), there is a plate p fixed to the bearings for the crank shaft and a loose disc q upon the shaft, a brake plate s between the disc q and the chain wheel c rotative with said shaft and longitudinally movable with reference thereto. The disc q and brake s engage with teeth q^4, s^3. Clutches r, connect rotative disc q with fixed plate p on back pedaling. Further rotation of brake s with the shaft cause the teeth w^4 and s^3 to ride upon each other, and forces brake s against the chain wheel c. When the pedals are held stationary the clutch r for setting the brake as well as the clutches for connecting the chain wheel A with the driving member (shaft b, bush d fixed thereon and disc e secured to said shaft) are disengaged so that said chain wheel c can run free. Thus, we have here, too, a device which is broadly like that described in Farrow's application.

In *British patent to Michael* (Record pages 343-346), is shown a back pedaling coaster brake. The construction and operation is simple and readily understood from an inspection of the drawings. They show a clutch that locks the driving member to the driven member on forward pedaling; that disengages when the pedals are held stationary; and a brake band that is contracted around the driven member, on back pedaling.

In *British patent to Boult* (Record pages 349-354), we have a back pedaling coaster brake device in which radially movable blocks, on an independently rotary wheel l that lies within a flange k on the sprocket wheel, are moved radially by a cam g that is attached to the driven shaft E, to lock the sprocket wheel to the pedal shaft in order to drive the former, or, by regulating the degree of pressure, to operate as a brake upon the sprocket.

In *patent to Whitney*, No. 527,571 (Rec.. pages 357-360), we find a back pedaling device, that is attached to the rear wheel

of a bicycle, and consists of a sprocket wheel b, placed loosely upon the hub a of the rear wheel, so as to have a limited movement thereon, a split ring or brake band e that is secured at one end to the hub, and is so connected with the sprocket wheel that said sprocket wheel can be rotated slightly, with relation to said brake ring. On forward driving the brake ring is compressed, and turns the hub of the driven wheel in the forward direction. On back pedaling the ends of the brake ring are separated (one of its ends being attached to the hub and the other to the gear) and the expansion of the ring forces it into contact with a friction surface on a stationary member g, whereby the wheel is retarded.

In *British patent to Watkins* (Rec., pages 363–372), we find an axle a, a central hub b that is movable longitudinally upon the axle, bosses b^3 b^3 on each end of the hub sleeve, respectively, that are rotative with the axle, hubs c c on the axle at each end of the sleeve b and adjacent to the bosses b^3 b^3 respectively, to which the spokes are attached, the sleeve b, and hubs cc, all being freely rotative, ratchet toothed pinions d^3 d^3 on the axle a, and pawls c^3 c^3, on the hubs c c, respectively, that engage with said teeth on the pinions d^3 d^3, to drive said hubs c c, on forward driving. One of the pedals e is fixed to the axle, but the other pedal f is secured to the axle, so that it can be screwed in and out upon its end a^4. In forward driving the said ratchet connection between the axle and the hubs c c, operates to drive said hubs c c. When the pedals are held stationary, the pawls glide over the teeth, and the spoke wheels can rotate independently, and so coast. In back pedaling the pedal f is screwed upon the axle, forcing the friction surfaces on the hubs c c, into frictional contact with frictional surfaces on each end of the central hub sleeve b, which remains stationary with the axle, and so brakes the spoke hub.

The earlier use of which Mr. Brown testifies, and these earlier patents, to which we have referred, show that long before Farrow invented the devices shown in either of his applications mentioned in the decree, devices had been made, used and patented, that were designed for use in connection with bicycles which were operated, through the chain, by the feet of the rider upon the pedals, to drive the rear, or driving

wheel, of the bicycle forward on forward pedaling; and that such devices were adapted to permit the rear wheel to coast, or run free, when the pedals were held stationary with the rider's feet upon them, and that they were adapted to apply a brake on back pedaling. Some of the devices shown in said prior patents, even showing a brake that is applied on the *hub* of the rear wheel, and the Stover and Hance patent showing a spoon brake applied to the tire of the rear wheel. It would have been impossible, therefore, for Mr. Farrow to have gotten claims that would have covered all devices by which these results can be obtained. As we have shown, *complainant's* expert, Mr. Doolittle, recognized that Farrow could not have obtained claims on a combination coasting and braking devices operated by the pedals (Rec., page 53, fol. 56). The patents of the prior art that he cited to substantiate his statement, do not show back pedaling coaster brakes, in which the brake is operated on the rear *hub* of the wheel, but the patents that we have offered in evidence, and referred to above, do show this feature also.

VI.

Royalties should not have been awarded on the earlier Morrow coaster brake specifically mentioned in the interlocutory decree (that of Morrow patent 611,073) because said brake does not embody the inventions of Farrow's said applications.

Defendant did not employ an expert to explain the construction and operation of the coaster brake of Morrow's patent 611,073 (the one specifically referred to in the bill of complaint and interlocutory decree) and compare it with the device of Farrow's application No. 614,140. It therefore devolves upon us to bring out these points.

Three constructions are disclosed in Farrow's said application No. 614,140. One of these is illustrated in Figs. 1–4 inclusive; another in Figs. 5 and 6; and another in Figs. 7 and 8 (Rec. pages 98, 99).

The Construction of the Farrow Application No. 614,140.

In the construction of Figs. 1–4 a brake shoe A is so pivoted upon the bicycle frame C that it can be made to engage the tire of the rear or driving wheel F. A lever B is pivoted to one of the two braces of the bicycle frame that extends from the hub of the rear wheel to the pedal shaft. A rod b connects the lever B and the free end of the brake shoe. The free end of the lever B projects beyond the connection with the brake rod b, into a "mortised" head b^3 that forms a guide for the driving chain D. When the bicycle is driven forward the upper section of the chain is taut and passes freely through the mortised head b^3; but on back pedaling the upper section of the chain sags so as to engage a pawl c which locks it to the mortised head b^3 of the lever B, so that the lever can be turned by the chain to operate the brake shoe. (See the specification Rec. pages 88–91, and the drawings Rec. pages 98–99.)

Farrow's Modified Form.

The constructions of Figs. 5 and 6 and 7 and 8, respectively, differ only in the position and operation of the pawl (Rec. page 90).

The Characteristic Feature of Farrow's Application No. 614,140

The characteristic feature of this construction is the lever for clutching the driving chain on back pedaling, whereby the brake is applied by the chain to the tire of the rear wheel.

The Morrow Coaster Brake Compared with Farrow's Device.

The coaster brake of Morrow's patent 611,073 comprises a spoon brake 17 that is hung on a bell crank lever with arms 14 and 21, so that it can be made to engage the tire of the rear wheel. The forward arm 21 has a sliding engagement, by means of a slot and a bolt, with another arm 25. This arm 25 projects from an operating disc 26 which latter is clutched by the pedal shaft on back pedaling so as to rotate it, and thus to operate the brake. On forward pedaling the ball clutch

connection between the pedal shaft and operating disc 26 is disengaged. (Rec. pages 115–118.)

The ball clutch between the driving and the driven parts that makes coasting possible, and the pivotally hung spoon brake are the only features of the coaster brake of Morrow's patent 611,073 that it has in common with Farrow's application 614,140, and both of these features are shown in the Stover and Hance patent, as is pointed out by Mr. Doolittle, complainant's expert (Rec. page 53).

Farrow himself expressly says that the Morrow coaster brake has not that feature which we have shown to be the characteristic feature of Farrow's device, viz: the lever which clutches the chain on back pedaling (Rec. page 34).

The Allowed Claims of Farrow's Application No. 614,140.

When Mr. Skidmore took charge of this application he filed a new specification with seven claims (Rec. pages 88–92). The second claim was cancelled in response to the requirement of the Patent Office, and renumbered claims 1, 2, 3, 5 and 6 were put into interference (Rec. pages 95–98). Claims 1, 2, 3, 5 and 6 were awarded to other parties to said interferences and claim 4 was rejected as not patentable over said claims (Rec. pages 99, 108). Farrow, therefore, was not awarded any of these claims, but had he been, the situation would not have changed, for every one of the six claims is drawn on the peculiar feature which we have shown to be the distinctive feature of this Farrow application 614,140, viz: the means for engaging the driving chain to operate the brake. That element is found in every one of the six claims, and since it is *not* found in the coaster brake of Morrow's patent 611,073, Farrow would have been in no better position even had he been awarded these claims.

Finally there is claim 2 of the claims filed by Farrow in the first instance (Rec. pages 85, 86), and which Mr. Doolittle seems to think might have been saved by filing a divisional application (Rec. page 49), since it was not rejected at the time division was required (Rec. pages 87–88). The distinctive feature of this claim is this same lever which in this instance

engages with *the teeth of the sprocket wheel*, to be turned thereby to operate the brake, instead of by the driving chain. So even had Farrow saved this claim it would have made no difference to this suit, for this element is not found in the Morrow coaster brake.

Complainant's witnesses testified that in both said Morrow coaster brake and said Farrow coaster brake, the brake was operated by the pedals on back pedaling, and that both permitted the bicycle to coast when the feet were held stationary, and complainant argues that this proves mechanical equivalency. In other words, complainant reasons that because the same results are obtained by both devices they must be mechanical equivalents, disregarding entirely the question whether the results are obtained by substantially the same means in each device, operating in substantially the same way (Rec. pages 25, 34, 42, 53, 54).

We submit, therefore, that Mr. Justice Cole erred in holding that the coaster brakes of Morrow's patent No. 611,073, are the mechanical equivalents of the device of Farrow's application No. 614,140, and requiring defendant by the interlocutory decree to pay royalties upon them.

VII.

Royalties should not have been awarded on the later Morrow coaster brake, namely Exhibit E 10, because said brake does not embody the inventions of Farrow's said applications.

On the accounting before the auditor defendant placed upon the stand two experts, Mr. Arthur S. Brown, and Mr. Charles E. Foster, and had them compare Exhibit E 10 with the device described in Farrow's application, No. 600,359. Both experts analyzed and examined the two devices, in order to determine (1) whether Exhibit E 10 is substantially the same as the device disclosed in Farrow's application, No. 600,359, and operates in substantially the same way to produce the same

results; (2) to determine the same question with reference to the devices described in the *claims allowed* Farrow in his said application, No. 600,359. In pursuing the latter inquiry, both experts took up not only the claims that were actually allowed, but all the claims that Farrow filed in the first instance.

All of the claims that Farrow originally filed (thirteen in all) were rejected (Rec., pp. 60-69). Subsequently the entire original specification was cancelled by Mr. Skidmore and a new specification was filed with ten claims. Of these new claims Nos. 6, 7, 8 and 9 were allowed, and became respectively claims 1, 2, 3 and 4 (Rec., pp. 75-77). Both experts adopt the same order of discussion, describing first the mechanism and operation of the device set forth in Farrow's application, No. 600,359, next describing the construction and operation of Exhibit E 10, and finally comparing the devices one with the other. We shall follow the same general plan.

The Construction of Farrow's Device.

Two constructions are disclosed in Farrow's said application, No. 600,359, namely, that illustrated in Figs. 1, 2 and 5 of his drawings, and that illustrated in Figs. 3 and 4 (Rec., p. 254, fol. 362). Mr. Brown points out that the mechanism for coasting, and for securing the braking action in the construction shown in Figs. 1, 2 and 5, is characterized by a sprocket wheel that is capable of sliding axially on the hub. Mr. Brown points out (Rec., pp, 254, 255), that in said construction there is a sprocket wheel which receives power from a sprocket chain that is driven in the usual way, by pedals and another sprocket wheel on the pedal shaft; that this driven sprocket wheel on the rear hub of the rear wheel of the bicycle, has a sliding axial movement on said hub; that when this sliding sprocket wheel is moved inwardly, and is at the same time rotated by the driving sprocket wheel, it becomes *clutched* to the hub of the rear wheel by the action of a screw clutch that operates like an ordinary screw; that if, however, the rider of the bicycle desires to coast, that is to say, to permit the bicycle to continue its onward course while the rider keeps his feet upon the pedals, he stops pedaling, holding his feet on the pedals, and that as a result the sprocket wheel on

the rear wheel stops its rotation, while the wheel continues to revolve; that, during the above operation, the sprocket wheel and the hub become unscrewed from each other, and that during the unscrewing movement, the sprocket wheel slides axially outward away from the screw thread face of the hub; that as soon as the sprocket wheel is thus cleared from its clutching engagement with the hub, by means of its outward axial movement, the wheel rotates freely without resistance; that if now, the rider of the bicycle desires to apply the brake, for the purpose of stopping the wheel, he back pedals, and that, as the result of the back pedaling, the sprocket wheel on the rear hub is rotated backwardly, until the projection which is carried thereby is brought into contact with a stationary portion or stop on the frame of the bicycle; that when the stop engages the projection carried by the sprocket wheel, further backward rotation of the sprocket wheel causes the brake spring, or brake band, to become clamped to the surface of the hub.

The Characteristic Features of the Farrow Device.

Thus, as stated above, the action of that mechanism of Farrow's that is shown in Figs. 1, 2 and 5 of his application No. 600,359, is characterized by a *sprocket wheel* that is capable of *sliding axially* on the hub. When the sprocket slides *inwardly* it is clutched to the hub in order to drive the bicycle; when it slides *outwardly* it becomes unclutched from the hub, and the bicycle is free to coast; and when it is rotated backwardly, the brake is applied (Rec. p. 255, fol. 365). Mr. Brown, moreover, shows that this Farrow device is further characterized by the fact that the *brake spring*, or brake band, *is carried by the sprocket wheel itself*, so as to rotate with the sprocket wheel, and so that it partakes of the sliding axial movement of the sprocket wheel, and, furthermore, that these details are necessary in the construction shown (Rec., page 255, fol. 365). Another characteristic feature of this construction of Farrow's pointed out by Mr. Brown is that *the sprocket wheel* on the rear hub, and *the sprocket wheel* on the pedal shaft, while directly in line with each other during the ordinary forward driving of the bicycle, *are out of line*, so that the chain connecting them

is angularly disposed, when the parts are in position for coasting, and when the brake is applied. This, as Mr. Brown says, is an essential feature of the construction, since it is necessary in order to enable the sprocket wheel to be again clutched to the hub, when it is desired to again drive the bicycle forward (Rec., page 256, fol. 366).

Mr. Foster, defendant's other expert, brings out these same features as characteristic of, and essential to the device shown in Figs. 1, 2 and 5 of Farrow's said application, No. 600,359 (Rec., pages 288, 289).

Exhibit E 10 Compared With Farrow's Device.

Turning now to Exhibit E 10, we will compare it with the device disclosed by Figs. 1, 2 and 5 of Farrow's said application. In Exhibit E 10 the sprocket wheel on the rear hub of the bicycle is capable of turning on the hub, but it has no axial or longitudinal movement on the hub. Thus it lacks that characteristic feature of the Farrow device (Rec. page 259, fol. 372, page 289, fol. 432). In Exhibit E 10, which is a back pedaling coaster brake, the sprocket wheel on the rear hub is driven forward in the manner usual in these devices (Rec., page 258, fol. 369). Still referring to Exhibit E 10, it is seen that as the sprocket wheel is rotated in a forward direction, it clutches the hub, so that they rotate together to drive the bicycle forward. To accomplish this, the sprocket wheel has on its forward face cam inclines, which co-operate with corresponding cam inclines on a *clutch ring*. When the sprocket wheel is rotated forward its cam inclines ride upon the cam inclines of the *clutch ring*, thereby forcing said *clutch ring* inwardly, until its inner surface engages frictionally surfaces on the hub, which are surrounded by the clutch ring. When it is desired to coast, with Exhibit E 10, the rider keeps his feet on the pedals, and stops pedaling. The rear hub keeps on rotating, as a result of the momentum of the wheel, the effect of which is to carry the cam inclines of the *clutch ring* forward, till they cease to engage with the cam inclines on the sprocket wheel, and accordingly the clutch ring releases the hub. If the brake is to be applied in this (Exhibit E 10), the rider back pedals, thereby

turning the sprocket wheel of the rear hub backwardly. As the sprocket wheel is turned backwardly, the square shoulders on its said cam inclines come in contact with with the square shoulders on the cam inclines of the said *clutch ring*, and accordingly the *clutch ring* is rotated backwardly with the sprocket wheel, but is not forced inwardly, and so does not clutch the hub. As the *clutch ring* is rotated backwardly, the cam inclines that are on its inner edge come in contact with corresponding cam inclines on a *brake ring*, and said *brake ring* is thereby forced axially inwardly, and in turn forces inwardly a brake shoe connected with a stationary part of the frame, and the brake shoe engages the hub to retard it (Rec., page 258). Thus, it will be noted that in Exhibit E 10, the *sprocket wheel*, itself, has no longitudinal movement. The sprocket acts upon the clutch ring, either to drive it forward or to drive it backward. When driving the clutch ring forward the sprocket causes the *clutch ring* to move axially to grip the hub. When the clutch ring is moved backward by the backward rotation of the sprocket wheel, the *brake ring* is moved inwardly, thereby forcing the normally stationary brake shoe in the proper direction to brake and stop the wheel. (Rec., page 258, fol. 372; page 259, fol. 371).

The Points of Difference Between Exhibit E 10 and Farrow's.

Both Mr. Brown and Mr. Foster point out the following material differences between Exhibit E 10 and the device shown in Farrow's Figs. 1, 2 and 5, viz.:

(1) That in the Farrow device, the driving, coasting, and braking effects, are due to the axial movement of the *sprocket wheel*, whereas in Exhibit E 10 the sprocket wheel has no axial movement whatever;

(2) That in the said Farrow device the sprocket wheel has a screw clutch member, which screws directly into a corresponding screw clutch member on the hub, whereas, in Exhibit E 10, the sprocket wheel has cam inclines, which force a clutch ring inwardly into clutching engagement with the hub, the clutching being frictional only;

(3) That in the said Farrow device the brake consists of a *spring brake*, or *brake band*, whereas in Exhibit E 10 the brake is a conical, annular brake shoe of some yielding material;

(4) That in the said Farrow device, the brake spring, or brake band, is carried directly by the sprocket wheel, so that it rotates therewith during the forward propulsion of the bicycle, whereas in Exhibit E 10 the brake never rotates, and does not partake of its movement;

(5) That the brake springs of the Farrow device move in and out with the sprocket wheel, as well as rotate with it, which is unlike anything shown in Exhibit E 10;

(6) That in the Farrow device the brake pressure is secured by causing one end of the brake spring to become obstructed by a projection or stop on the frame of the bicycle, whereas in said Exhibit E 10 the brake shoe is always prevented from rotation by connection with a fixed portion of the bicycle, and its brake movement is simply an in and out movement with relation to the cup-shaped flange carried by the hub;

(7) That in the said Farrow device the resumption of driving is due to the strain of the sprocket chain endeavoring to run straight (perpendicular to the axis of the rear wheel and pedal axle), whereas in Exhibit E 10 there is no variation in the position of the chain with relation to the plane which it keeps with the axes of the rear wheel and pedal shaft (Rec., pages 259, 260, 289–291).

In addition to calling attention to the above structural differences between Exhibit E 10 and the devices described in Farrow's application, No. 600,359, both experts emphasize a fundamental difference in the principles upon which they operate. In both forms of the device that Farrow describes in his said application, the braking pressure must be maintained by the power of the rider, on account of the tendency of the brake spring to rotate the sprocket wheel, whereas in Exhibit E 10, on the other hand, the brake, when applied, requires practically no effort in order to maintain the braking pressure, since the brake does not tend to rotate the sprocket wheel (Rec., page 278, fol. 410; page 290, fol. 433).

Again, both experts show that in both forms of Farrow's device the brake can only be applied when the sprocket wheel occupies a particular position, whereas in Exhibit E 10 the brake is always ready to be applied (Rec., page 278, fols. 409, 410; page 290, fol. 433).

Both Mr. Brown and Mr. Foster accordingly find that Exhibit E 10 is unlike the said Farrow device shown in Figs. 1, 2, and 5 of his drawings, in construction, organization, and mode of operation (Rec., pages 260, fols. 373–374; page 291, fol. 435).

Farrow's Modified Form Described.

The experts next gave their attention to the Farrow construction shown in Figs. 3 and 4 of his drawings. This construction is succinctly described by Mr. Brown at pages 260 and 261 of the Record, substantially as follows: In this construction the sprocket wheel turns freely upon the hub of the rear wheel of the bicycle. When turned forwardly the sprocket wheel is clutched to the hub by means of clutching frictional rollers that are indicated as c c in Fig. 3 of the drawing (Rec. pages 80, 81), which rollers are located in recesses in the hub. The wheel is thereby permitted to run freely while coasting, if the sprocket wheel is held stationary. The brake in this construction is governed entirely by the action of the sprocket chain, which drives the sprocket wheel on the rear hub. The brake consists of a brake spring, or brake band, as in the construction illustrated in Farrow's Figs. 1, 2 and 5. This brake band is illustrated in Fig. 4 of the drawings. The brake band ordinarily turns with the sprocket wheel, and is loose upon the hub. In the construction shown in Fig. 4, the ends of the brake spring, or brake band, have outwardly projecting wedge shaped extensions, illustrated at d^3 with which a lever F cooperates. The lever F is adapted to be operated upon by two pins g, which project through the rim of the sprocket wheel, as indicated in Fig. 3 of the drawings. During the ordinary running of the bicycle, the lever F is inoperative, because recesses in it which are marked f^1 in Fig. 4, are in line with the pins g, so that when the links of the sprocket chain come in contact with said pins g, as the sprocket wheel

revolves, and said pins g are pressed inwardly, radially, they do not affect the lever F. If, however, the movement of the pedals is stopped while the lever is opposite the space in the chain where it leads from one sprocket wheel to the other, then said lever is free to move longitudinally, as the result of its own momentum when the rotation of the sprocket wheel is stopped. When back pedaling takes place, if the rear sprocket wheel is moved far enough to bring the pins g into contact with the sprocket chain, said pins are forced radially inwardly, since the lever has been moved so that the recesses in it no longer register with the said pins g, and said lever is forced inwardly by said pins against the inclines of the wedge shaped extension d^3 on the brake spring, or brake band, thereby pressing the ends of said brake spring, or brake band, toward each other, and contracting it so as to apply brake pressure on the hub of the rear wheel. On resuming forward driving the lever F looses its hold on the brake spring, or brake band, and the same, being expansible, springs outwardly, releasing the hub (Rec. pages 260, 261).

EXHIBIT E 10 COMPARED WITH FARROW'S MODIFIED FORM.

This construction is so radically different from Exhibit E 10 that it seems unnecessary to point out particularly the points of difference. Both Mr. Brown and Mr. Foster have done so, however, and we shall mention briefly the points of difference that they have laid particular emphasis upon.

Mr. Brown directs attention to the fact that in the Farrow construction, illustrated in his Figs. 3 and 4, the braking action is due to an expansible brake spring, whose ends are forced together by means of a lever carried by the sprocket wheel, which in turn is controlled by the *direct action of the links* of the sprocket chain, and that there is no mechanical resemblance at all between such a structure and anything that is shown in Exhibit E 10, for in Exhibit E 10 the braking pressure is produced by a brake cone, which is ordinarily stationary, and which is forced axially inwardly against the hub, by the action of an axially sliding brake ring surrounding the hub, which itself is forced axially inwardly by cams on a clutch ring, which is rotated backwardly by the sprocket

wheel as it rotates backwardly (Rec. page 261). The chain is absolutely essential to the operation both of the device shown in Farrow's Figs. 3 and 4, and the device shown in Farrow's Figs. 1, 2 and 5. Essential not only as a means of driving the sprocket wheel, but as the direct means for operating the parts that constitute the braking mechanism. Our meaning will be made clear by calling attention to the fact, as Mr. Brown has done, that the Morrow device could be used just as well in connection with a chainless bicycle, where instead of a sprocket wheel on the rear hub, a gear wheel is provided that meshes with a corresponding driving gear. While, on the contrary, in both forms of construction shown by Farrow, if the gear wheels are substituted for the chain the Farrow devices have been deprived of the means which in the construction shown in Figs. 1, 2 and 5 cause the brake spring to move axially to disengage the stop on the frame, and which in the construction shown in Figs. 3 and 4, forces the lever F down over the ends of the brake ring to contract it about the hub (Rec. pages 261, 262). This, we think, brings out clearly the fact that both of Farrow's forms of construction not only have several elements that are not found in Exhibit E 10, but that those elements that are common to the Farrow devices and Exhibit E 10, operate very differently, and furthermore, that the chain is essential to effect the operation of the parts. Mr. Foster has laid great stress upon the fact that the chain plays this conspicuous and essential part in the operation of both forms of Farrow's devices, and contends that that is really the distinctive feature of his construction (Rec. page 287, fol. 428; page 289, fols. 431, 432).

Mr. Foster, we think, has shown quite clearly that the construction illustrated in Farrow's Figs. 3 and 4 is not only impracticable, but practically inoperative (Rec. pages 291, 292, fols. 436, 437).

After having compared Exhibit E 10 with both the device shown in Farrow's Figs. 1, 2 and 5, and that shown in Figs. 3 and 4, with reference to the construction and operation of the respective devices, regardless of the claims that were allowed on his said devices, we cannot but reach the conclusion that Exhibit E 10 is inherently and fundamentally different from either of Farrow's said devices, both in construction and mode of operation.

Inasmuch as the devices described in Farrow's application, No. 600,359, *when considered broadly as a whole*, are so unlike Exhibit E 10 that there is no resemblance between said devices, either in construction or operation, it must of necessity follow that the *claims allowed* Farrow cannot cover devices that are embodied in Exhibit 10, because Farrow's claims cover only certain specific forms of construction that are found in his devices, and necessarily so, since they are limited by the prior art, as has been shown.

The Allowed Claims of Farrow's Application No. 600,359.

The claims that were allowed Farrow in his said application No. 600,359, are all expressed in terms that restricted them to certain details of his construction, namely, some one or more of those essential parts of his construction which we have mentioned and which are not found in Exhibit E 10, and for which no mechanical equivalent exists in Exhibit E 10. It will be sufficient to refer to these claims briefly pointing out these essential parts with reference to each of them.

Claim 1 (original claim 6). This claim calls for "an extension hub," which is essential to its operation, in order that the sprocket and brake ring may move axially. This claim also calls for "an expansible brake spring mounted thereon." It also calls for "a sprocket rim mounted upon the brake spring:" and finally, for "means for automatically clutching the parts for propulsion and releasing them for coasting."

Now, neither an *extension hub*, nor an *expansible brake spring* is found in Exhibit E 10, nor has the brake wheel in Exhibit E 10 any direct connection with the very different braking devices that are used in that structure. Again, since there are no parts in Exhibit E 10 corresponding to those mentioned in claim 1, it cannot be said that in Exhibit E 10 there are found "means for automatically clutching the parts for expulsion, and releasing them for coasting." In order that the subject of claim 1 should be present in a device, it is necessary that there should be a *brake spring*, which is *expansible*, and which is *mounted* on the hub; and that the *sprocket wheel* should be *mounted* on the *brake spring*. No such construction

is contained in Exhibit E 10, nor are there mechanical equivalents for the parts mentioned in claim 1. A mechanical equivalent is a device that operates in substantially the same way to produce substantially the same results as another device. In this case the particular brake employed in Exhibit E 10 is not the mechanical equivalent of the brake spring recited in this claim, because it does not operate in the same way. The brake spring recited in the claim is one that must be mounted so as to turn *with the sprocket wheel*, in order to produce the results of the device as described in Farrow's specification, and illustrated in his drawings. Any other brake, to be a mechanical equivalent therefore, must operate in this way. This is not true with reference to the braking feature of Exhibit E 10, since it never turns with the sprocket wheel, and is not contracted around the hub, as the result of any connection with the sprocket wheel, and with the fixed part of the mechanism, at its other end, as is the case with the expansible and contractible brake spring recited in this claim (Rec., pages 270, 295, fol. 443).

Claim 2 (original claim 7). The second element of this claim is "the brake spring having overlapping ends." The term "overlapping ends" is a limitation or further detail of construction not found in claim 1. There is nothing whatever corresponding to this in Exhibit E 10, or anything that could possibly come under these terms. What is meant by the limitation is clearly shown in Figs. 2 and 5 of Farrow's drawings, which show the two ends of the brake spring overlapping each other (Rec., pages 76, 270, 271, fol. 395, page 296).

Claim 3 (original claim 8). This claim calls for "the extension hub, the expansible brake spring having overlapping ends, the sprocket rim, an automatic catch device," and "a stationary detent for engaging the brake spring when the sprocket rim is radially rotated backwardly." This last element is the latch *e* shown in Fig. 1 of Farrow's said drawings (Rec., pages 77–81). As there is no brake spring in Exhibit E 10, of course, there is no detent for engaging it and rotating it backwardly. There is in fact, absolutely nothing of this character in Exhibit E 10, nor is there any mechanical equivalent for it, because the mechanism of Exhibit E 10 operates in an entirely different way, its brake shoe being forced into con-

tact with the cup shaped flanges of the hub, by means of the movement of cams, one on the cam brake disc, and the other on the clutch disc, as heretofore described (Rec., pages 271–272, fol. 397; page 296, fols. 445, 446; page 297, fol. 446).

Claim 4 (original claim 9). This claim calls for a brake spring, which, as we have pointed out, is not found in Exhibit E 10, and also requires, as a further limitation, that this brake spring shall be "located within the coasting device," and that it shall have "its ends overlapping and provided with projections." These very specific limitations are shown in Fig. 5 of the drawings (Rec., pages 80–81). There is absolutely nothing in Exhibit E 10, which in the slightest degree is analogous to the spring brake wound upon, and provided with projections, as specified as to these elements of the claim. Another element of this claim is "a catch or detent for engaging one end of the spring." There is no catch or detent for engaging the spring in Exhibit E 10. This claim also specifies that the other end of the spring is engaged by the driving sprocket, by which is meant that one end of the spring is connected directly with the driving sprocket, so that the spring is carried by the rotation of the sprocket, in such manner that the backward rotation of the sprocket compresses the spring, when the projection on its other end engages the catch or detent. It is clear that there is nothing in Exhibit E 10 like this, or analogous to it (Rec., page 273, fol. 399; page 297, fols, 446, 447) The Auditor found:

> "There is no expansible brake spring in Exhibit E 10, the brake pressure being produced by a cone shaped brake, which performs its work in a substantially different way from the Farrow brake spring. There is a radical difference, not only in the construction, but in the operation, and one cannot be called the mechanical equivalent of the other" (Rec., page 234, fol. 326).

Other Claims of Farrow's Application No. 600,359 Considered.

Although the auditor found it necessary under the decree to examine Exhibit E 10 only with reference to Farrow's said allowed claims (Rec., page 234, fol. 326), defendant's experts compared Exhibit E 10 with certain other claims that were

filed by Farrow, and which were not rejected by the Patent Office upon reference to the prior art, but which were objected to on the ground that they covered independent inventions, which could be covered, if at all, only in other applications. Farrow's amendment of July 9, 1897, contained two such claims, Nos. 4 and 10 respectively (Rec., page 75–78). In addition to these claims Farrow's application, as originally filed, contained five other claims, Nos. 4, 9, 10, 12 and 13 respectively, which were not rejected on prior patents (Rec., pages 68–71). Of these last mentioned claims, claim 4 is identical with claim 4 contained in the amendment of July 9, 1897, mentioned above. We shall refer briefly to said claims 4 and 10 of Farrow's said amendment of July 9, 1897, and to his said original claims 9, 10, 12 and 13.

Said *claim 4* recites a combination including "the spring pressed clutch and lever with its releasing mechanism," "the latch for retaining the clutch from engagement, and the knock off for depressing the latch" (Rec., page 76). It is impossible to find any such parts as these in Exhibit E 10 (Rec. pages 273, 298, fol. 449).

Claim 10 of the said amendment of July 9, 1897 (Rec. page 77), requires a combination, which shall include a spring "provided with radially depressed openings," "a clutch device comprising a sliding disc, having pins to enter said openings, and means for sliding said disc on the axle." There is no such device in Exhibit E 10, and no device having any such purpose, or any such object (Rec. pages 273, 298, fol. 449).

Claim 9, filed with the original specifications (Rec. p. 69), calls for a brake spring loosely and "concentrically mounted" on the hub, "the sprocket rim mounted *eccentrically* upon the brake spring, and a fixed detent for preventing backward rotation of the brake spring." The gist of this claim, as compared with allowed claim 3, is that the brake spring is necessarily one which is concentric with the hub, and upon which the sprocket is eccentrically mounted. Of course Exhibit E 10 has no such construction, because it has no brake spring, and consequently nothing of the sort, which can be concentric with the hub, and upon which its sprocket can be eccentrically mounted. In fact, Exhibit E 10 does not have any-

thing upon which the sprocket is eccentrically mounted, its sprocket being concentrically mounted upon the *hub* (Rec. p. 273, fol. 401, p. 274, fol. 401, p. 298, fols. 449, 450).

Claim 10 of the specification originally filed (Rec. p. 69) calls for "the brake spring provided with the lip to engage a recess in the sprocket rim, and the thickened and thinned sections of the spring forming an eccentric seat or bearing for the sprocket rim mounted thereon, whereby when traction is made upon the rim, it is caused to grip the brake spring for the propulsion of the driving wheel, all as set forth and described." This claim, it will be noted, is similar to allowed claims 3 and 4, since it includes the brake spring attached to the sprocket by means of a lip engaging a recess on the sprocket, but includes besides the eccentric relation of the brake spring and the sprocket, recited in claim 9, next above considered. In addition to these features, it specifies that the sprocket spring has "thickened and thinned sections." What has been said above, therefore, as distinguishing said allowed claims 3 and 4, and said claim 9, as originally filed, from Exhibit E 10, applies with full force to this claim. The additional limitation "thickened and thinned sections" causes the eccentric relation between the brake spring and the sprocket. Thus, it will be seen that this claim is directed to an exceedingly limited subject matter, and that necessarily and obviously Exhibit E 10 has no such construction, or any mechanical equivalent therefor (Rec. p. 274, fols. 402-403: p. 275, fol. 403, p. 298, fol. 450).

Claim 12, of the specification originally filed (Rec. p. 69), also specifies "the brake spring thickened at the central section, and thinned towards its overlapping ends, and provided with the lip and side extensions for engaging both the sprocket rim and a fixed part of the bicycle, whereby traction can be applied to the ends of the sprocket, for drawing it into frictional engagement with the hub extension as set forth." This claim, it will be seen, specifies those features which characterize Farrow's brake spring, and which have been considered in connection with the preceding claims. It is obvious that none of these features, or mechanical equivalents therefor are contained in Exhibit E 10 (Rec. p. 275, fol. 403; p. 298, fol. 450; p. 299, fol. 450).

Claim 13 of the specification originally filed (Rec. p. 69, 70) recites the extension hub, and the sprocket rim, and also "the brake spring interposed between them, and provided with an extension taking into a recess in the rim, and a side extension as d^1, in combination with the cone bearing fixed into and prevented from rotation, by the fork of the frame, said cone bearing carrying the disc E, and detent e, and the saucer shaped dust guard s, all as and for the purposes described." This claim thus recites the location of the brake spring within the hub and the sprocket, and the fact that the brake spring has two extensions or projections one of which connects it with the sprocket wheel, and the other with the frame of the bicycle, when the sprocket wheel is rotated backwardly. It also specifies certain other details of construction, such as the also specifies certain other details of construction, such as the spring latch e, the cone bearing and saucer-shaped dust guard. It is obvious that Exhibit E 10 has none of these features (Rec. p. 275, fol. 404; p. 299, fol. 450).

Conclusion as to Exhibit E 10.

We submit that Exhibit E 10 differs both in construction and mode of operation from the mechanism called for by each and every one of the claims that we have considered. We have shown that several of those parts of the device in Farrow's application No. 600,359, that are essential to the operation of said device, are not found in Exhibit E 10, and that the mechanical equivalents of such parts are not found in Exhibit E 10. We have shown that Exhibit E 10 is different from the device described in Farrow's said Letters Patent, No. 600,359, both in mechanical construction and mode of operation. Exhibit E 10 does not, therefore, "embody the inventions mentioned in the application for Letters Patent, filed in the Patent Office by the complainant on July 24, 1896, the serial number of such application being 600,359." We quote from the interlocutory decree. We have seen that all of Farrow's claims, both those that were allowed, and those other claims that we have considered (those that were objected to by the Patent Office on the grounds mentioned above) were all limited in terms to a construction entirely

different from Exhibit E 10, and, furthermore, that each and every one of them called for certain elements that are not found in Exhibit E 10. Had the prior art been admitted in evidence, as we contend it should have been, it would have shown, even more clearly, that all of Farrow's said claims were *necessarily* limited to his specific construction.

We accordingly submit that Judge Hagner erred in overruling the Auditor, and requiring defendant to account for brakes like Exhibit E 10.

Inasmuch as Exhibit E 10 was not introduced into the case until after the interlocutory decree had been entered, and the case had been sent to the auditor for an accounting under said decree, and inasmuch as no evidence was introduced during the trial of the case, and no contention was made that devices like Exhibit E 10 were within the terms of the contract sued upon, defendant clearly cannot be required to pay royalties on devices like Exhibit E 10, unless Exhibit E 10 does "embody the inventions mentioned" either in Farrow's said application No. 600,359, or in his said application No. 614,140, or unless Exhibit E 10 is the same as the device described in Morrow's Letters Patent, No. 611,073, because the interlocutory decree expressly ordered the defendant to pay royalties on said three devices, and on no others.

As stated above, it is not even contended by the complainant either that Exhibit E 10 embodies the inventions described in Farrow's application No. 614,140, or that said exhibit is the same as the device described in Morrow's Letters Patent No. 611,073. We have shown in this brief that said exhibit does not embody the inventions of Farrow's application No. 600,359. It accordingly follows that defendant cannot be required to account for devices like Exhibit E 10.

VIII.

No royalties are due complainant on the Farrow devices themselves.

The bill of complaint admits the receipt of $2500.00 as advance royalties (Rec., page 2). The Record discloses that

defendant company has made only 68 of these devices (Rec. page 423), so that at the rate of 50c. royalty per coaster brake, complainant has been overpaid $2466.00. The defendant is the one who has suffered in this transaction.

IX.

SUMMARY.

We have shown under Points I-III, inclusive, that the case was tried and decided on one theory and affirmed and expanded by the Court of Appeals upon an entirely different theory, and under Points IV-VII, inclusive, we have shown that on neither theory can a cause of action be made out against the defendant. Finally under Point VIII we have shown that complainant has been more than paid in full the only royalties that defendant ever became liable for under the contract in suit.

We respectfully submit that the judgment of the lower court is erroneous and should be reversed, and that the bill should be dismissed with costs.

Respectfully submitted,
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